United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7471

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For the Second Circuit

B
P/S

THE PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY,

Plaintiff-Appellant,

against

OVERSEAS OIL CARRIERS, INC.,

Defendant-Appellee.

ANSWERING BRIEF OF DEFENDANT-APPELLEE

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Statement of the Issue

We cannot agree with the Issue as set out on the first page of Plaintiff-Appellant's Brief because the expenses of medical care have been paid and/or were allowed to plaintiff by Judge Goettel's Opinion. Furthermore, the critically ill seaman was placed aboard plaintiff's vessel, not for repatriation, but for urgent shipboard medical attention. Accordingly, we suggest that a proper statement of the issue would be:

When a vessel responds to a call for emergency medical assistance at sea are her additional fuel costs resulting from a diversion and from an increase in speed recoverable at law from the assisted vessel?

Statement of the Case

The parties stipulated that the matter was to be submitted for trial and decision by the District Court based

upon an Agreed Fact Statement dated April 7, 1975, (2a-9a) and an Additional Agreed Fact Statement, dated June 7, 1976 (10a-19a).

The liability issue was jointly described as "the question of whether defendant is or is not liable to reimburse plaintiff's diversion costs and medical and out-of-pocket expenses" (10a) as result of plaintiff's vessel having diverted in order to render emergency medical assistance to a member of the crew of defendant's vessel.

The District Court ruled (20a-28a) that plaintiff was entitled to recover $500 representing nursing and accommodations expenses aboard plaintiff's vessel, but that plaintiff was not entitled to recover for its additional fuel expenses. Defendant had already paid plaintiff's bills for $132 representing the doctor's services and $116 representing the costs of medicines, etc.

In paragraph 24 of the Agreed Fact Statement (6a) defendant conceded that plaintiff's vessel had consumed extra fuel by reason of having had to divert and steam an extra 232 miles solely because of defendant's request for assistance, conceded that plaintiff's vessel had consumed additional fuel because of an increase of speed from 23 knots to 25 knots in order to arrive at the place of rendezvous, but did not concede any causal relationship between the defendant's request for assistance and plaintiff's vessel having maintained her increased speed from the place of rendezvous to New York.

Accordingly, the issue is whether plaintiff is entitled to recover the additional fuel costs occasioned by the diversion of 232 miles coupled with an increase in speed from 23 knots to 25 knots to reach the point of rendezvous, all in response to defendant's call for medical assistance.

Against that background, we do not argue with the Statement of the Case contained on page 2 of Plaintiff's Brief.

ARGUMENT

POINT I

There is no basis in law for a recovery by plaintiff of its diversion costs on theories of unjust enrichment.

Three points are firmly established at the outset. First, the radio-telephone conversations between the Masters of the two vessels and the subsequent exchange of correspondence did not establish any contractual relationship between the parties. Second, plaintiff cannot recover its diversion expenses under any theories of the laws of salvage or life salvage. Third, there are no decisions of our Courts squarely in point.

As to the first point, the parties stipulated in paragraph 29 of the Additional Agreed Fact Statement that:

> "* * * plaintiff's Master told defendant's Master that plaintiff 'may look' to defendant for reimbursement, and defendant's Master acknowledged that plaintiff's Master had so stated. During these 'R.T.' remarks, plaintiff's Master did not demand reimbursement on behalf of plaintiff nor did defendant's Master agree to make reimbursement on behalf of defendant. Both Masters simply left open for subsequent determination by their respective empoyers, plaintiff and defendant, whether plaintiff would demand reimbursement and, if so, whether defendant would make reimbursement." (10a)

As to the second point, it now seems firmly established in this litigation that the American cases do not support

the proposition that one who saves life at sea disassociated from any salvage of property is entitled to a salvage award. Similarly, our American Salvage Act, 46 U.S. Code Section 729, does not afford any basis for life salvage in the absence of concurrent saving of property.

Accordingly, plaintiff is restricted to a claim as set out in paragraph 53 of plaintiff's complaint, which reads as follows:

> "53. Because of those hereinbefore stated efforts, services, and expenses made, performed, and incurred by plaintiff, its ship and staff, at defendant's request, defendant satisfied its obligations to William Turpin stated in paragraphs 25 and 26 at plaintiff's cost and risk, and defendant was thereby *unjustly enriched.*" (emphasis supplied)

As to the third point, Judge Goettel wrote in the opening paragraph of his Opinion (20a):

> "This case raises the interesting (and somewhat novel) question of whether those who go to the aid of seamen in distress are entitled to have their expenses reimbursed."

In closing his Opinion Judge Goettel added (27a):

> "Considering the absence of controlling authority it appears appropriate to consider the public policy aspects.* * *
>
> For the present it would appear to be beyond the province of this district court to inaugurate a new policy deviating from the centuries old common law doctrine."

The question squarely before this Court is whether, in the absence of existing authority, it will forge a new body

of law which would be at odds with long-standing traditions of the sea, which have served the industry and the welfare of seamen so well in the past.

Plaintiff asks this Court to substitute land-based legal theories of restitution for the traditions of the sea.

Plaintiff urges that Judge Goettel's Decision was mistaken because he relied upon *Shooters Island Shipyard Co.* v. *Standard Shipbuilding Corp.*, 293 Fed. 706 (3 Cir. 1923), and *F. E. Grauwiller Transp. Co.* v. *King*, 131 F. Supp. 630 (E.D.N.Y. 1955), *aff'd* 229 F. 2d 153 (2 Cir. 1956), for the proposition that one claiming unjust enrichment must predicate it upon misconduct or fault on the part of the defendant. In support of this proposition plaintiff cites several provisions from the Restatement of Restitution (which do not have the force of law) and one New York case, *Berri* v. *City of New York*, 16 N.Y.S. 2d 86 (City Ct. N.Y. Co. 1939), *aff'd* 16 N.Y.S. 2d 1015 (App. Term, 1st Dept. 1939), *aff'd* 259 App. Div. 453, 19 N.Y.S. 2d 347 (App. Div. 1st Dept. 1940) dealing with a refund of prepaid real property taxes where the taxing authority took title to the property before the period for which the taxes had been paid. We submit that this *Berri* case hardly constitutes precedence for a decision on the facts for this Court. Clearly, the taxing authority was "unjustly enriched" for the taxes would never have become due had they not been paid in advance of their due date by the taxpayer.

F. E. Grauwiller Transp. Co. v. *King, supra*, involved a libel in admiralty by a company which owned a scow to recover possession of that scow and a libel in admiralty by another corporation seeking to recover for the costs of repairs effected to the scow. In holding that the defendant could not defeat the libel to recover possession by claiming

that plaintiff would be unjustly enriched because of repairs already made, the late Judge Bruchhausen wrote at 131 F.Supp. 634 as follows:

> "The respondent, Elliott, contends that if Grauwiller recovers possession of the scow Jeanne in her present seaworthy condition, brought about by extensive and costly repairs made at the Rodermond yard, then Grauwiller will have been unjustly enriched. The case of *Shooters Island Shipyard Co.*, v. *Standard Shipbuilding Corporation*, 3 Cir., 293 F. 706, cited by Elliott, does not aid him. The Court in 293 F. at page 714 thereof holds that a valid claim for unjust enrichment can only be based upon 'an element of misconduct or fault, or undue advantage taken by one party of another'. There is no evidence thereof in this case."

In a short affirming opinion, this Court of Appeals characterized Judge Bruchhausen's decision as "well reasoned" (229 F.2d 154). Despite the Restatements of Restitution therefore, it would seem that this Court has endorsed the view that in admiralty matters, at least, a recovery based upon alleged unjust enrichment must be predicated upon some element of misconduct or fault. Certainly, this was the view of the United States Court of Appeals for the Third Circuit in *Shooters Island Shipyard Co.* v. *Standard Shipbuilding Corp., supra,* wherein it was stated at 293 Fed. 713:

> "True, the security of the first mortgage was greatly enhanced in value by the expenditures made upon it and stress is laid on the doctrine that equity will not permit a person to be unjustly enriched by the expenditure of another. But this doctrine is controlled by an element of injustice entering into the transaction which, in turn, involves an element of

misconduct or fault, or undue advantage taken by one party of another."

The same element of wrongdoing was referred to many years ago by the New York Court of Appeals in *People ex rel. Dusenbury* v. *Spier*, 77 New York 144, 150 (1879), where the Court wrote:

> "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention."

Shanks v. *Wilson*, 86 F. Supp. 789 (S.D.W.Va. 1949) involved an action to recover for coal-mines delivered by plaintiff under a sub-contract which contained no provisions for reimbursement. The Court wrote at 86 F. Supp. 794:

> "It is true that there may be circumstances in which the law requires a person to do an act or pay a sum of money though he has made no contract to do so and even though it may be against his will. In such circumstances the legal fiction employed is that the person from whom the performance is exacted is obligated by law to do the act required in order that justice may be done, and fraud or other wrong-doing prevented. This is the so-called 'quasi-contract'."

The essential elements of a quasi-contractual claim (one predicated upon a contract implied in law) were defined by the New York Court of Appeals in the case of *Miller* v. *Schloss*, 218 N.Y. 400, 406 (1916). At page 407 the Court defined the quasi-contract in the following terms:

> "A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which ex oequo et bono belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractural, in order to fit the cause of action to the contractural remedy."

In essence, this decision tells us that a quasi-contract, or a contract implied in law "is an obligation which the law creates". In order to recover in this action, therefore, plaintiff must convince this Court that despite a total lack of precedence there is support in the law for its claim for reimbursement of the extra fuel consumed during the rescue effort.

Even if we were to assume, therefore, that Judge Goettel was in error in holding that an element of fault or wrongdoing was essential to a recovery predicated upon "unjust enrichment" (in reliance upon the authorities cited in his Opinion and in this Brief), this should not be sufficient to call for a reversal, for Judge Goettel held in addition that

there was no basis in the law and no basis in the decisions for the type of claim made in this case.

Judge Goettel held that the burden was upon plaintiff to establish a legal basis for the recovery of these monies, and the legal basis had not been demonstrated to exist.

POINT II

Plaintiff is not entitled to recover $11,608.95 for additional fuel expenses on the theory that it fullfilled defendant's obligation to repatriate the sick seaman.

The second argument put forward by plaintiff's counsel is that the expenses of extra fuel consumed by plaintiff's vessel can be characterized as repatriation expenses and hence an obligation which was that of defendant in any event.

We submit that this is a factual and legal red herring. As was pointed out in the opening Statement of this Answering Brief, the defendant's object in calling for medical assistance at sea was to place William Turpin, its desperately ill crewmember, in medical hands and not to effect his repatriation to New York.

Coincidentally, both vessels were headed Westbound, plaintiff's vessel towards New York and defendant's tanker towards Baltimore . We believe it safe to say, however, that even if plaintiff's passenger vessel had been on an Eastbound course headed for Europe the ill seaman would still have been transferred. The urgency lay in the need for professional medical attention and not in getting the man to a U. S. East coast port. If Turpin had been disembarked and placed in a hospital in Europe, then admittedly defendant would have been under an obligation to effect his repatriation to his place of sign-on in the United States once he

was able to travel. Needless to say, such a repatriation, whether by air or by sea would not have cost $11,608.95. This is the amount which plaintiff now seeks to recover under the guise of repatriation expenses.

Furthermore, the first of two quotations on page 9 of plaintiff's brief from 2 Norris, *The Law of Seamen* (3d. ed. 1970) is completely irrelevant, since it refers to the obligation of the owner of a ship to pay for hospital and medical expenses of a sick crewmember. As has been pointed out earlier in this Brief, defendant paid medical expenses before this action was instituted, and Judge Goettel's Decision called upon defendant to pay an additional $500 representing accommodations and nursing expenses aboard plaintiff's vessel. Defendant has not cross-appealed on that issue, and the only item before this Court is the claim for the expenses of additional bunkers.

The second quotation from 2 Norris, *supra,* on page 9 of plaintiff's brief is, we believe, a reflection of a legitimate concern for the welfare of the sick or injured seaman himself. The object is to establish a procedure which would make hospital or surgical care available as promptly as possible. This is exactly what the Master of s/s *Overseas Progress* had in mind, and is what happens every time a similar call for professional medical assistance is made by a ship at sea without a doctor aboard. The focal point of the entire arrangement is the welfare of the sick or injured man.

We suggest that the humanitarian aspects of this tradition of the sea will be in jeopardy if a price tag is going to be placed on emergency medical assistance at sea. There will inevitably be situations where the Master who should be calling for help will decide to forego a call for assistance for fear of running up disproportionate expenses brought

about by possible diversions and extra fuel costs to the rescuing vessel. The desirable focal point will have been lost—the welfare of the injured man will become subservient to the possible monetary consequences.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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